

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL TAYLOR : CIVIL ACTION
:
v. :
:
:
CITY OF PHILADELPHIA, et. al. : NO. 96-740

M E M O R A N D U M

WALDMAN, J.

April 1, 1998

I. INTRODUCTION

Plaintiff is a former Philadelphia police officer. He is suing the City, various police officers and a prosecutor who participated in the 1986 criminal investigation that resulted in his arrest on charges of accepting bribes. Plaintiff was acquitted by a jury in 1994. This action was filed on February 1, 1996.

Plaintiff asserts federal claims pursuant to 42 U.S.C. §§ 1983 and 1985, alleging that defendants violated his First, Fourth, Fifth, Sixth and Fourteenth Amendment Rights. He also asserts state law claims of intentional and negligent infliction of emotional distress, false arrest, false imprisonment, malicious prosecution, misuse of process, negligence and official oppression.¹

¹ Plaintiff neither separately pleads nor elaborates on the basis for each claim. In neither his complaint nor supporting briefs does plaintiff clearly articulate which claims apply to which defendants based on their conduct. The court has nevertheless parsed plaintiff's allegations and viewed them as liberally as one fairly can in the overall context of the complaint and evidence of record.

Presently before the court are defendants' Motions for Summary Judgment.²

II. LEGAL STANDARD

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case under applicable law are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. Id. at 256. Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991) (citing Celotex Corp. v.

² Defendant Steven Clymer moved separately from the other defendants for summary judgment. Mr. Clymer was an assistant district attorney assigned to work with the police on the investigation of plaintiff. Plaintiff does not oppose Mr. Clymer's motion. While Patrick Devlin remains a named defendant, he was never served with process and apparently died before this action was commenced.

Catrett, 477 U.S. 317, 323 (1986)).

III. FACTUAL BACKGROUND

From the record, as uncontroverted or viewed most favorably to plaintiff, the pertinent facts are as follow.

In 1984 the Ethics Accountability Division ("EAD") was created within the Philadelphia Police Department to investigate allegations of police corruption. In 1986 defendant Creeden, a captain, was in charge of the EAD. Mr. Creeden reported to defendant Kane who, in turn, reported to defendant Tucker, the police commissioner. Defendants Kalmar, Rentz, Devlin and Washlick were officers assigned to the EAD.

In the late Spring of 1986, as a result of information provided by an informant, officers in the EAD began to suspect that plaintiff had accepted bribes. The informant was Jonathan White, the owner of an illegal lottery operation.

Mr. White's first contact with the EAD was in May 1985 when defendant Kalmar, posing undercover as a corrupt police officer, unsuccessfully solicited a bribe from him. In the Fall of 1985 Mr. White made an anonymous telephone call to the EAD informing them that a competing illegal lottery operator had paid police officers to shut down his operation at 1301 Point Breeze Avenue. The tip resulted in a ten day EAD surveillance of activity around that location, but the investigation produced no definitive results.

In the Spring of 1986 Mr. White was served with a subpoena to testify before a grand jury investigating allegations of police corruption. Beginning in June 1986, Mr. White provided the EAD with information regarding corrupt officers in exchange for immunity from prosecution. In interviews with defendants Creeden, Kalmar and Devlin, White identified plaintiff as one of several officers in the 17th District to whom he had paid protection money.

Mr. White reported that he paid plaintiff regularly over a period of more than two years. He told the EAD that he would meet with plaintiff at the corner of 15th and Carpenter Streets where he would make a usual monthly payment of two hundred dollars. He related to the EAD officers that plaintiff would telephone him to arrange the meeting by identifying himself with the code "Number Nine." Mr. White identified plaintiff from a photo array.

EAD officers then attempted to corroborate Mr. White's information. They confirmed that plaintiff was assigned to the 17th District as a lieutenant during the time Mr. White said he had payed him, collected information regarding plaintiff's personal automobiles, and reviewed police records filed by plaintiff and other records reflecting police activity at 1301 Point Breeze Avenue. EAD officers also interviewed police officers and other illegal lottery operators, some of whom confirmed that a lieutenant in the 17th District was accepting bribes.

In July 1986 Mr. White appeared before the grand jury. He testified that for more than two years he had paid plaintiff bribe money, that he personally met plaintiff at 15th and Carpenter Streets and that plaintiff called to arrange meetings identifying himself as "Number Nine."

On July 16, 1986, Mr. White telephoned plaintiff from defendant Creeden's office at the direction of defendants Kane, Creeden, Devlin and Kalmar. The call was recorded. In a brief conversation, Mr. White and plaintiff agreed to meet at the "same old place." They did not identify any location. Approximately forty-five minutes later, Mr. White drove to 15th and Carpenter Streets. He was wearing an EAD wire. He was holding two fifty and five twenty dollar bills given to him by the EAD to hand to plaintiff. Defendant Rentz positioned himself to videotape any meeting from a nearby van.

Plaintiff arrived at 15th and Carpenter Streets and entered White's car. Mr. White told plaintiff that he wanted to expand his illegal lottery operation and was looking for police protection in his new area. Plaintiff replied that he "got one guy in mind" and would pass along White's telephone number. It was agreed that the person who would contact Mr. White would identify himself as "Number Nine." They also briefly discussed the death of Tyrone Stinnett, an employee of a competing lottery operation who had recently been found dead of an apparent

suicide.

The audio and video tapes of the conversation between Mr. White and plaintiff span four and a half minutes. Plaintiff states and the report of a surveilling officer shows that the meeting was several minutes longer. Plaintiff does not dispute the content of the tapes, but believes that portions were deleted in which he and Mr. White further discussed the Stinnett death. Plaintiff retained an expert who opined that there were "serious and questionable problems" regarding the accuracy and integrity of the tapes. A defense expert expressed a conflicting opinion. The court at this juncture, of course, will credit the version of plaintiff's expert.

After the meeting, Mr. White drove to another location where he was met by defendants Kalmar and Devlin. They searched White and his car and did not find the two hundred dollars they had given him. He told the officers he had given the money to plaintiff. Mr. White was not under constant surveillance as he drove between locations. Thus, it was physically possible for Mr. White to discard the money at a moment he was not being observed. There is no evidence of record that Mr. White was aware he was not being surveilled at all times during the ten block drive.

When no police officer contacted Mr. White regarding protection for a new area of operation, the EAD decided to set up

another meeting between plaintiff and the informant. On August 20, 1986, Mr. White telephoned plaintiff at the direction of defendants Kane, Creeden, Devlin and Kalmar. The EAD recorded the call. Plaintiff agreed to meet Mr. White at the corner of 13th and Spring Garden Streets. The EAD put a wire on Mr. White and arranged to videotape the meeting. Mr. White was given nine twenty and four five dollar bills to hand to plaintiff. The serial numbers were pre-recorded. Defendant Kane informed Commissioner Tucker of the planned meeting.

Plaintiff arrived at the agreed meeting spot and entered Mr. White's car. The two talked about the expansion of White's lottery operation and plaintiff's attempt to contact someone on White's behalf. Mr. White handed plaintiff the two hundred dollars. Plaintiff denies that he accepted it.

The tape recordings of the meeting span just under five minutes. Plaintiff states and the notes of a surveilling officer show that the meeting lasted several minutes longer. Plaintiff's expert expresses the same opinion regarding the tapes of this meeting as those of the first meeting.

After plaintiff exited Mr. White's car, he was confronted by defendants Devlin and Washlick who escorted him to EAD headquarters. Plaintiff was not permitted counsel. Plaintiff admittedly, however, was not arrested and remained free to leave at any time. EAD officers asked plaintiff to cooperate

with their ongoing corruption investigation. Plaintiff declined. Plaintiff told Mr. Creeden that Mr. White was his informant and tried to explain why he agreed to meet with him. Mr. Creeden was uninterested in plaintiff's story and told him to "shut up."

While plaintiff was at EAD headquarters, defendant Kalmar sought and obtained a search warrant for plaintiff's person and vehicle. Thereafter, Mr. Washlick searched the jacket plaintiff had been wearing and recovered the pre-recorded bills from a pocket.

On August 21, 1986 plaintiff received notice that he was suspended from the Department with intent to dismiss. He was also informed that he was a target of an investigation and offered the opportunity to testify before the grand jury.

At a meeting with Officer Kalmar in September 1986, Mr. White related that in the past he had given Officer Nathaniel Cannedy money intended for plaintiff. On October 8, 1986, defendants Devlin and Kalmar interviewed Officer Cannedy. He admitted wrongdoing and agreed to cooperate with the ongoing EAD probe. Mr. Cannedy told Officers Devlin and Kalmar that he never actually picked up money for plaintiff, but that plaintiff had accused him of taking money from White that belonged to him.

Defendant Kalmar testified about his knowledge of plaintiff's activities to the grand jury. The grand jury also heard the audio tapes of the telephone conversations between

plaintiff and Mr. White. They viewed the video tapes and heard the audio tapes of the meetings that followed. On October 9, 1986, the grand jury issued a Presentment recommending fifty-seven counts of bribery and related criminal charges against plaintiff. Fifty-two of the fifty-seven counts were based exclusively on Mr. White's testimony. The Presentment was approved by the Honorable Lynne Abraham on October 10, 1986.

On October 14, 1986, defendant Kalmar prepared an affidavit of probable cause for an arrest warrant in which he averred that he had reviewed the evidence presented to the grand jury and this evidence was accurately summarized in the grand jury's Presentment. The warrant was issued and plaintiff was arrested on the same day. Plaintiff was released on an unsecured "own recognizance" bond in the amount of \$10,000, with no travel restrictions.

Officer Kalmar and Mr. White testified at a preliminary hearing on January 8, 1987 at which the court found that the Commonwealth had established a prima facie case against plaintiff. The next six years were consumed by plaintiff's pre-trial suppression motion and subsequent appeal.³ Ultimately,

³ The Common Pleas Court granted plaintiff's motion to suppress the tape recorded evidence on the ground that it was acquired in violation of applicable state law, but rejected as a ground for suppression possible tampering as well as other grounds proffered. The Superior Court reversed the decision to suppress this evidence in an opinion filed on March 9, 1993.

plaintiff was acquitted by a jury on February 2, 1994.

Plaintiff then appealed his discharge from the police force to a fact-finding arbitrator. In December 1995, the arbitrator ruled against plaintiff after finding that the City had just cause to discharge him. The arbitrator concluded that:

[T]here is no convincing evidence that what appears on the [audio and video] tapes is erroneous. In fact, grievant in response to an unsolicited phone call from a known numbers writer goes to a regular meeting place, whose location does not even have to be stated, and engages in a conversation about police protection for an illegal numbers operation. He even assigns a code number so the numbers writer can operate under a cloak of anonymity.

This conversation, between a Police Captain and a leading numbers writer, is relaxed and friendly and has nothing to do with legitimate police business. Although grievant claims that the EAD informant was, in fact his own, and that he was conducting an investigation of a murder, there is no evidence supporting that assertion except his uncorroborated word.

Grievant gave no convincing reason why he was pursuing this investigation personally since it would not have been normal for him to do so. In any event, the part of the conversation which was on the tapes reveals a passing remark about the person's death and not any serious attempt to determine if an apparent suicide was in reality, a murder. It is entirely unclear why, after the tapes allegedly ended, he would return to a subject which appears to have been closed.

Finally, there is a claim that the surveillance tapes were modified or truncated. The expert testimony on this point is conflicting but having viewed the video and listened to the tapes it appears that the conversations, despite inaccurate reporting about times by the surveillance team members, are without meaningful alterations or omissions.

On balance, grievant's claims that the EAD informant

was his own and that he was investigating a murder are not credible. The better evidence establishes that he was doing exactly what the City claims he was doing and that he received illicit money for the reasons stated in the charges against him.

The essence of plaintiff's claims against the individual defendant officers is that they knew or should have known that Mr. White's information was unreliable.

Specifically, he contends that the statements in June and July 1986 of Mr. White that he had paid plaintiff personally at meetings at 15th and Carpenter Streets and his statement in September 1986 that Officer Cannedy had picked up payments for plaintiff are inconsistent, and then faults defendant Kalmar for not further questioning Mr. White or noting the purported inconsistency in his affidavit.

Plaintiff asserts that the EAD knew or should have known that Mr. White had a motive falsely to implicate plaintiff because he had participated in three attempts in 1985 to shut down White's operation. The EAD surveillance reports documenting the police activity at White's lottery location in the Fall of 1985 do not mention plaintiff's name. Other police records from that time period show that plaintiff's platoon made no arrests at the location during 1985 and that plaintiff entered the premises at 1301 Point Breeze Avenue at least four times during the Fall of 1985 without making any arrests.

Plaintiff asserts that the EAD also should have suspected White's motives because plaintiff had ordered or participated in numerous arrests of White and his criminal

associates during the period he said he was paying plaintiff. Official police records, however, show that plaintiff's platoon made only three of the sixty-four arrests at 1301 Point Breeze Avenue between 1983 and February 1986, and that during 1985 plaintiff visited the premises thirty-five times without making any arrest.

Plaintiff asserts that the EAD recklessly attached significance to Mr. White's photographic identification without considering the prior informant relationship which plaintiff claimed existed or the proximity of White's lottery location to the 17th District headquarters where he could have learned the identity of individual officers.

Plaintiff admits that at the meetings orchestrated by the EAD he tried to convince White that he would put him in contact with a police officer who would accept money to protect his new location. Plaintiff acknowledges that the meetings "looked bad." Nevertheless, plaintiff explains that he had used Mr. White as an informant on several prior occasions and spoke about arranging for police protection only to engage him in conversation that might lead to more information on the Stinnett death.

Plaintiff says that he documented his relationship with Mr. White as an informant and points to two police incident reports recording encounters in 1985 between the two. These

documents, however, contain no information from which the EAD or anyone else could have inferred the existence of an officer-informant relationship. Moreover, there is no evidence or suggestion that any incident report was completed following plaintiff's July 16, 1986 meeting with White.

Plaintiff asserts that Mr. White had the opportunity after their first meeting to dispose of the bait money before being searched and that he does not know how the pre-recorded bills appeared in his jacket pocket after the second meeting.

Plaintiff contends that the City and former Commissioner are liable for failing to establish adequate written procedures for the conduct of EAD investigations or procedures and training for EAD officers regarding the use of informants. Plaintiff claims that the City and former Commissioner were deliberately indifferent to the "obvious risks" that EAD officers would improperly use their investigative powers to violate the constitutional rights of innocent police officers. There is no evidence of record that any other police officer was falsely accused or arrested by the EAD or was acquitted after being indicted following an EAD investigation at any time before or after 1986.

IV. DISCUSSION

A. Plaintiff's Federal Claims

To sustain a claim under 42 U.S.C. § 1985(3), a

plaintiff must prove a conspiracy motivated by a racial or class based discriminatory animus designed to deprive a person or class of persons of the equal protection of the laws, an act in furtherance of the conspiracy and an injury or deprivation of a right or privilege of a citizen of the United States. Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997) (citing United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott, 463 U.S. 825, 828-29 (1983); Griffin v. Brekenridge, 403 U.S. 88, 102-03 (1971)).⁴ One cannot reasonably find from the evidence of record that any defendant discriminated or conspired against plaintiff because of a racial or other class based animus. Defendants are entitled to summary judgment on plaintiff's § 1985 claim against them.

In § 1983 cases, federal courts apply the limitations periods applicable to corresponding state personal injury claims. See Owens v. Okure, 488 U.S. 235, 249-50 (1989); Wilson v. Garcia, 471 U.S. 261, 280 (1985). In Pennsylvania, such claims are subject to a two-year statute of limitations. See Knoll v. Springfield Township, 763 F.2d 584, 585 (3d Cir. 1985); 42 Pa. C.S.A. § 5524 (West Supp. 1997).

While state law provides the time within which a

⁴ Plaintiff never specifies on which subsection of § 1985 he predicates his claim. Neither subsection (1) or (2), however, conceivably could apply in this case and the court thus assumes that plaintiff relies on subsection (3).

plaintiff must file a § 1983 suit, federal law governs when the cause of action accrues. See Deary v. Three Un-Named Police Officers, 746 F.2d 185, 197 n.16 (3d Cir. 1985). A federal civil rights cause of action accrues when the plaintiff "knew or had reason to know of the injury that constitutes the basis of [the] action." Sandutch v. Muroski, 684 F.2d 252, 254 (3d Cir. 1982).

Plaintiff was clearly aware of the factual basis upon which he predicates all of his constitutional claims, except for malicious prosecution, by the time of his arrest on October 14, 1986. Thus, the limitations period for these claims clearly expired by October 14, 1988, over seven years before this action was commenced.⁵

The limitations period for a malicious prosecution claim, however, runs from the time the plaintiff is acquitted in the underlying criminal proceeding. Heck v. Humphrey, 114 S. Ct. 2364, 2374 (1994); Rose v. Bartle, 871 F.2d 331, 349 (3d Cir. 1989); Cap v. K-Mart Discount Stores, Inc., 515 A.2d 52, 53 (Pa. Super. 1986). Thus, plaintiff's malicious prosecution claim is timely, albeit by one day.

⁵ Plaintiff also never explains how defendants violated his First or Sixth Amendment rights at all. The Fifth Amendment, of course, does not apply to the conduct of state or local officials. Bartkus v. Illinois, 359 U.S. 121, 129 (1950); Knoetze v. U.S., 634 F. 2d 207, 211 (5th Cir.), cert. denied, 454 U.S. 823 (1981); Shoemaker v. City of Lock Haven, 906 F. Supp. 230, 237-38 (M.D. Pa. 1995). Plaintiff never mentions the First, Fifth or Sixth Amendments in his briefs.

Plaintiff predicates his malicious prosecution claim on the Due Process Clause of the Fourteenth Amendment.⁶

In Albright v. Oliver, 510 U.S. 266 (1994), reh'g denied, 510 U.S. 1215 (1994), the Supreme Court virtually foreclosed § 1983 malicious prosecution claims based on the Fourteenth Amendment. See Albright, 510 U.S. at 270 n.4 (plurality opinion) ("In view of our disposition of this case, it is evident that substantive due process may not furnish the constitutional peg on which to hang such a tort"). See also Washington v. Summerville, 127 F.3d 552, 558 (7th Cir. 1997)

⁶ Plaintiff appears to confuse or conflate substantive and procedural due process. In the portion of his response brief captioned malicious prosecution, plaintiff argues that because he can satisfy the Paul v. Davis stigma-plus test he can sustain a Fourteenth Amendment claim for malicious prosecution. He then cites several cases involving the liberty interest of a person stigmatized in the course of his dismissal from public employment. That interest, however, is accorded only procedural due process protection, specifically the right to an opportunity to refute the charge on which the dismissal was based and to clear one's name. See Austin v. Neal, 933 F. Supp. 444, 455-56 (E.D. Pa. 1996), aff'd, 116 F.3d 467 (3d Cir. 1997). Of course, the statute of limitations has long run on any claim that

(footnote 6 continued)

plaintiff was denied a pretermination or name clearing hearing in connection with his dismissal almost ten years before this action was commenced. Prior to the Supreme Court opinion in Albright v. Oliver, federal claims for a malicious state prosecution were generally predicated on substantive due process. Where a state provides an adequate remedy for one aggrieved by such a prosecution, it would ordinarily follow that there has been no procedural due process violation. See Perez-Ruiz v. Crespo-Guillen, 25 F.3d 40, 43 (1st Cir. 1994). In any event, the Supreme Court has effectively foreclosed a § 1983 malicious prosecution claim under the Fourteenth Amendment.

("Albright v. Oliver instructs that the only constitutional amendment that is implicated by a malicious prosecution claim is the Fourth Amendment"); Whiting v. Traylor, 85 F.3d 581, 584 n.3 (11th 1996) ("the Supreme Court -- in a plurality opinion -- held that no 'substantive' due process right exists to be free from malicious prosecution"); Taylor v. Meacham, 82 F.3d 1556, 1561 n.3 (10th Cir. 1996) ("Albright [holds] that a § 1983 malicious prosecution claim does not implicate the Fourteenth Amendment's substantive due process standards"), cert. denied, 117 S. Ct. 186 (1996); Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 256 (1st Cir. 1996) ("There is no substantive due process right to be free from malicious prosecution"); Eugene v. Alief Indep. School Dist., 65 F.3d 1299, 1303 (5th Cir. 1996) ("Albright held that pretrial deprivations of liberty, such as malicious prosecution, are not actionable under the Fourteenth Amendment, but left open the possibility that such claims would be actionable under the Fourth Amendment"); Singer v. Fulton County Sheriff, 63 F.3d 110, 114 (2d Cir. 1995) ("under Albright, the Fourteenth Amendment right to substantive due process will not support a federal claim for malicious prosecution"), cert. denied, 116 S. Ct. 1676 (1996); Gallo v. City of Philadelphia, 975 F. Supp. 723, 726 (E.D. Pa. 1997) ("There is no Fourteenth Amendment substantive due process right to be free from malicious prosecution").

The Supreme Court, however, did not foreclose the possibility of a § 1983 malicious prosecution claim based on the

Fourth Amendment prohibition against unreasonable searches and seizures. See Albright, 510 U.S. at 274-75. See also, Washington, 127 F.3d at 558; Murphy v. Lynn, 118 F.3d 938, 944 (2nd Cir. 1997), cert. denied, 118 S. Ct. 1051 (1998); Whiting, 85 F.3d at 584 n.3; Taylor, 82 F.3d at 1561; Roche, 81 F.3d at 256 n.5; Eugene, 65 F.3d at 1303; Gallo, 975 F. Supp. at 726.

Defendants argue that plaintiff cannot sustain a § 1983 malicious prosecution claim because he never suffered a constitutionally significant "seizure" under the Fourth Amendment.⁷ Defendants rely on cases holding that a criminal defendant suffers no constitutional injury when he is released after his encounter with the state without any requirement that he pay bail or limit his travels. See, e.g., Torres, 966 F.

⁷ Before Albright, the Third Circuit had the "most expansive approach" among the circuit courts in holding that the elements of a § 1983 malicious prosecution claim were the same as those of the common law tort. See Albright, 510 U.S. at 270 n.4 (citing Lee v. Mihalich, 847 F.2d 66, 70 (1988)). Since Albright, the Third Circuit has yet to address whether a malicious prosecution, standing alone, could violate the Constitution. Given the Supreme Court's opinion in Albright and the substantial weight of subsequent authority, however, it appears that to sustain a § 1983 malicious prosecution claim a plaintiff must do more than simply prove the common law tort. He must also implicate the Fourth Amendment's protections against unreasonable searches and seizures. See Torres v. McLaughlin, 966 F. Supp. 1353, 1361-62 n.7 (E.D. Pa. 1997). In the one post-Albright Third Circuit opinion discussing a § 1983 malicious prosecution claim, the Court does not address this issue. See Hilfirty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996). Based upon facts of that case, however, it is consistent with the post-Albright analysis of many other courts as the plaintiffs in Hilfirty were arrested pursuant to formal process. Id. at 576.

Supp. at 1364; Maldonado v. Pharo, 940 F. Supp. 51, 54 (S.D.N.Y. 1996); Subirats v. D'Angelo, 938 F. Supp. 143, 148-49 (E.D.N.Y. 1996); Niemann v. Whalen, 911 F. Supp. 656, 670 (S.D.N.Y. 1996).⁸

⁸ In response, plaintiff relies on the Circuit Court opinion in Albright v. Oliver, 975 F.2d 343 (7th Cir. 1992) to contend the alleged malicious prosecution coupled with loss of employment and public stigmatization constitute the requisite constitutional violation. Insofar as plaintiff appears to believe that the Seventh Circuit's due process analysis is still valid, he is mistaken. See Albright, 510 U.S. at 271 ("while we affirm the judgment [of the Seventh Circuit], we do so on different grounds"). Loss of employment or public stigmatization are irrelevant to a Fourth Amendment analysis.

Plaintiff's case, however, is distinguishable from those relied on by defendants because plaintiff was arrested pursuant to a warrant procured by legal process. See Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (2d Cir. 1995)(to maintain § 1983 malicious prosecution claim under the Fourth Amendment there must be deprivation of liberty or a seizure effected pursuant to legal process).

Plaintiff was seized for Fourth Amendment purposes at the time of his arrest. See also Whiting, 85 F.3d at 585-86; Brooks v. City of Winston-Salem, 85 F.3d 178, 183 (4th Cir. 1996); Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 3 (1st Cir. 1995).

To sustain a malicious prosecution claim under § 1983, of course, a plaintiff must also prove the elements of the common law tort of malicious prosecution, i.e., "(1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; and, (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice." Hilferty, 91 F.3d at 579 (citing Haefner v. Burkey, 626 A.2d 519, 521 (Pa. 1993)); Strickland v. University of Scranton, 700 A.2d 979, 984 (Pa. Super. 1997).

Thus, only a person who initiates criminal proceedings may be liable for malicious prosecution. A police officer may be

liable for malicious prosecution only if he conceals exculpatory evidence from or provides false or misleading reports to the prosecutor who makes the charging decision or in some other manner interferes with the prosecutor's ability to exercise independent judgment regarding the guilt or innocence of the accused. See Sanders v. English, 950 F.2d 1152, 1162-1164 (5th Cir. 1992); Robinson v. Maruffi, 895 F.2d 649, 655 (10th Cir. 1990); Kim v. Gant, 1997 WL 535138, *4-5 (E.D. Pa. Aug. 15, 1997); Torres, 966 F. Supp. at 1365; Rhodes v. Smithers, 939 F. Supp. 1256, 1273-1274 (S.D.W.Va. 1995).

Defendants argue with force that the only defendant who on this record could be said to have "initiated" proceedings is Officer Kalmar. He presented evidence to the grand jury and prepared the formal affidavit for the arrest warrant. Plaintiff has not pointed to any evidence showing that any other EAD officer did anything more than simply participate in the investigation.

The record does not show that Officer Kalmar misrepresented or concealed material information in presenting the case to the prosecutors. Indeed, plaintiff relies on reports prepared by Mr. Kalmar and other EAD members in faulting the decision to charge him. He does not allege that the reports are false or inaccurate.

The EAD reports include notes by defendant Kalmar of

meetings with Mr. White, notes of a meeting between defendant Kalmar and Officer Cannedy, EAD surveillance reports from the meetings between plaintiff and White and EAD surveillance reports from the investigation at 1301 Point Breeze Avenue in the Fall of 1985. There is no evidence that these records were unavailable to the prosecutors who evaluated the case against plaintiff. There is no evidence that Mr. Kalmar or any other defendant had any involvement in any tampering with the tapes. Moreover, plaintiff relies on the reports of surveilling officers, which he presumes to be accurate, to argue that his meetings with Mr. White ran several minutes beyond the tapes and thus such tampering may have occurred. There is no evidence that those reports were not made available to the District Attorney's office along with the tapes by the EAD.

One also cannot reasonably find on the record presented that Officer Kalmar or any reasonable officer in his place lacked probable cause to believe plaintiff had accepted bribes from Mr. White. Probable cause exists where the totality of facts and circumstances are sufficient to warrant a prudent person in believing that the suspect had committed or was committing an offense. Sharrar v. Felsing, 128 F.3d 810, 817-18 (3d Cir. 1997); Griffiths v. CIGNA Corp., 988 F.2d 457, 464 (3d Cir. 1993); Deary, 746 F.2d at 192; Pansy v. Preate, 870 F. Supp. 612, 618 (M.D. Pa. 1994), aff'd, 61 F.3d 896 (3d Cir. 1995).

In October 1986 Officer Kalmar and the EAD knew that Mr. White swore he had bribed plaintiff for over two years to obtain protection, that plaintiff immediately recognized and agreed to meet with Mr. White at a prearranged location which neither had to specify, that plaintiff used the same code in discussing future protection payments with Mr. White that White had advised the EAD the two had employed in the past to arrange for pay offs, that plaintiff willingly discussed helping White to get police protection for illegal lottery activities, that a cooperating corrupt police officer reported that plaintiff had complained about his diverting money from White intended for plaintiff and that two hundred dollars in pre-recorded bills given to Mr. White were recovered from plaintiff's jacket pocket after a meeting at which White swore he had handed the bills to plaintiff.

In considering a summary judgment motion, a court assumes to be true the plaintiff's version of events. There is no requirement, however, that investigating officers accept what a suspect says as true and always construe information they obtain in a light most favorable to a suspect. If there were, few suspects would ever be charged.

The EAD and the prosecutors quite reasonably could have rejected plaintiff's story that Mr. White was his informant at the same time plaintiff claimed he was trying to put him in jail,

even putting aside Mr. White's contrary account and records documenting numerous visits to the location of his gambling operation by plaintiff with no resulting arrests. The EAD and the prosecutors were not required to view Mr. White's statements about paying plaintiff and Officer Cannedy as inconsistent because plaintiff so characterizes them. It is not inconsistent that Mr. White made payments personally to plaintiff and also to someone else for delivery to plaintiff.⁹ Mr. White and Officer Cannedy did give conflicting accounts, although Cannedy confirmed that plaintiff accused him of taking protection money from White which should have gone to plaintiff.

Not every suspect confesses. Investigators and prosecutors must frequently sift through information not all of which dovetails and some of which is facially inconsistent. It is a rare case in which the recollections and accounts of all the witnesses are identical.

The essence of plaintiff's argument is that defendants were sloppy in their analysis of the evidence and for failing to probe further or to accept his alternative explanation for conduct even plaintiff admits "looked bad." Whether officers conducted an investigation professionally or negligently,

⁹ If Officer Kalmar had added to his affidavit a reference to Mr. White's statement about paying Officer Cannedy, as plaintiff suggests he should have, there clearly still would have been probable cause to arrest and prosecute plaintiff. See Sherwood v. Mulvihill, 113 F.3d 396, 401-02 (3d Cir. 1997).

however, is not material. The issue is the presence or absence of probable cause. Orsatti v. New Jersey State Police, 71 F.3d 480, 484 (3d Cir. 1995).

It is clear from the evidence, even when viewed most favorably to plaintiff, that Officer Kalmar and his colleagues had probable cause to believe plaintiff had accepted bribes prior to his arrest.¹⁰

As plaintiff has failed to show that any EAD officer violated his constitutional rights, it follows that the City and defendant Tucker are also entitled to summary judgment. See City of Los Angeles v. Heller, 475 U.S. 796, 798-99 (1986) (per curiam). Moreover, plaintiff's allegations that his arrest and prosecution resulted from a failure to train or supervise the EAD officers are unsupported by any evidence in the record.

The absence of a constitutional violation, of course, obviates the need for a further inquiry into whether a defendant deprived the plaintiff of a clearly established right of which a reasonable officer should have been aware from the state of the law and the facts known to him. The court thus need not formally

¹⁰ There is at least a theoretical difference between just cause to discharge someone for bribery and probable cause to charge him with bribery. The court is in no way bound by the findings or decision of the arbitrator and has, of course, undertaken its own analysis. Having done so, however, it is fair to note that the arbitrator's discussion appears reasoned and is not inconsistent with our decision.

resolve defendants' claim of qualified immunity.¹¹ It follows from the foregoing discussion, however, that at a minimum, a reasonable EAD officer could have believed by October 14, 1994 that there was probable cause to believe plaintiff had accepted bribes.

B. Plaintiff's State Claims

Lack of probable cause is also an essential element of a state malicious prosecution claim. See Gilbert v. Feld, 842 F. Supp. 803, 814-15 (E.D. Pa. 1993); Kelly v. General Teamsters, Chauffeurs, and Helpers, Local Union 249, 544 A.2d 940, 941 (Pa. 1988); Turano v. Hunt, 631 A.2d 822, 824 (Pa. Cmwlth. 1993), app. denied, 647 A.2d 905 (Pa. 1994). Thus, it follows that plaintiff has also failed to sustain his state malicious prosecution claim.

Plaintiff also asserts a claim against defendants for misuse of process separate from his claim of malicious prosecution. The misuse of process claim appears to be based on the common law tort of malicious use of process. See Miniscalco v. Gordon, 916 F. Supp. 478, 481 n.2 (E.D. Pa. 1996). Courts have distinguished these claims based on whether the underlying

¹¹ Qualified immunity protects officials from mistaken judgments and shields from liability "all but the plainly incompetent or those who knowingly violate the law." Hunter v. Bryant, 502 U.S. 224, 228 (1991). Qualified immunity is denied only if it reasonably appears that "the unlawfulness of [an official's] actions was so apparent that no reasonable [official] could have believed his actions were lawful." Lee v. Mihalich, 847 F.2d 66, 69 (3d Cir. 1988).

action was criminal or civil. See, e.g., McArdle v. Tronetti, 961 F.2d 1083 (3d cir. 1992) (malicious use of process is a "malicious prosecution in the civil context"); Kedra v. City of Philadelphia, 454 F. Supp. 653, 668 (E.D. Pa. 1978) (malicious use of process is known as a malicious prosecution in cases where the process used was criminal); Dietrich Indus., Inc. v. Abrams, 455 A.2d 119, 122 n.3 (Pa. Super. 1982) (cause of action for malicious use of process is known as malicious prosecution when it is founded upon a wrongfully instituted criminal proceeding). Regardless of any technical distinction between a claim for misuse of process and malicious prosecution, there is no difference between the essential elements to be proved under common law. See Casa Di Sardi, Inc. v. Alpha Motors, 323 A.2d 288, 290 (Pa. Super. 1974). Plaintiff's failure to produce evidence showing that criminal process was used without probable cause in the underlying prosecution is fatal to his claim for misuse of process as well as malicious prosecution.

There is no private cause of action for "official oppression" in Pennsylvania. See Smith v. Borough of Pottstown, 1997 WL 381778, *16 (E.D. Pa. June 30, 1997); Boyer v. Pottstown Borough, 1994 WL 385009, *4 (E.D. Pa. July 19, 1994); Gonzalez v. City of Bethlehem, 1993 WL 276977, *3 (E.D. Pa. July 13, 1993); Barnes v. City of Coatesville, 1993 WL 259329, *6 (E.D. Pa. June 28, 1993), aff'd, 60 F.3d 813 (3d Cir. 1995); Trichilo v. Borough

of Vandling, 1992 WL 398405, *4 (M.D. Pa. Aug. 13, 1992); Agresta v. Goode, 797 F. Supp. 399, 408-09 (E.D. Pa. 1992); Sambrick v. Borough of Norristown, 639 F. Supp. 1351, 1356 n.4 (E.D. Pa. 1986). Thus, defendants are entitled to judgment on this claim as well.

It is doubtful that Pennsylvania would recognize a claim for "negligent" investigation resulting in a wrongful arrest or prosecution where probable cause existed to arrest and prosecute the plaintiff. In any event, the acts of alleged negligence by the investigating officers were known to plaintiff more than two years before this action was commenced. Thus, his "negligence" claim is barred by the applicable statute of limitations, as are the balance of his state claims.

Plaintiff offers no response to defendants' argument that his false arrest and imprisonment claims are barred by the statute of limitations, and appears to concede the point. In any event, it is clear that any arrest and detention of plaintiff occurred more than two years before he commenced this action.

Plaintiff does argue that his claims for negligent and intentional infliction of emotional distress are not time barred because he continued to experience emotional distress through the conclusion of his criminal trial. The statute of limitations, however, does not run from the time a plaintiff last experiences the harmful affects of a tort, but rather from the time he

discovers or should have discovered that a defendant has engaged in tortious injury producing conduct. Moreover, plaintiff has failed to sustain these claims on the merits as well.

Only a plaintiff who witnesses an accident causing injuring to a close relative, sustains physical injury to himself or suffers distress as a result of a breach by a defendant of a distinct pre-existing duty of care may maintain an action for intentional infliction of emotional distress. See Green v. Bryant, 887 F. Supp. 798, 801-02 (E.D. Pa. 1995); Armstrong v. Paoli Mammal Hosp., 633 A.2d 605, 609 (Pa. Super. 1993), app. denied, 649 A.2d 666 (Pa. 1994).

To sustain a claim for intentional infliction of emotional distress, a plaintiff must show that he suffered severe emotional distress as a result of conduct by a defendant which was "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." Kazatsky v. King David Memorial Park, Inc., 537 A.2d 988, 991 (Pa. 1987). See also Bedford v. Southeastern Pa. Transp. Auth., 867 F. Supp. 288, 297 (E.D. Pa. 1994); Daughen v. Fox, 539 A.2d 858, 861 (Pa. Super.), app. denied, 533 A.2d 967 (Pa. 1988). It is the responsibility of the court preliminarily to determine whether the pertinent conduct is sufficiently extreme and outrageous to permit recovery. Cox v. Keystone Carbon Co., 861

F.2d 390, 395 (3d Cir. 1988). One reasonably could not remotely find from the evidence of record that any defendant engaged in conduct which was atrocious, outrageous or utterly intolerable in our civilized society.

Finally, insofar as plaintiff has premised his state tort claims against the city on respondeat superior liability, the City is also entitled to judgment on the ground of immunity. See 42 Pa.C.S.A. §§ 8541, 8542(b).

V. CONCLUSION

For the reasons set forth above, defendants are entitled to summary judgment on plaintiff's claims against them. Accordingly, the court has entered an order granting defendants' motions and entering judgment in their favor.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL TAYLOR : CIVIL ACTION
: :
v. : :
: :
CITY OF PHILADELPHIA, KEVIN : :
TUCKER, ANDREW KALMAR, JOSEPH : :
WASHLICK, PATRICK DEVLIN, : :
MICHAEL CREEDON, JERROLD KANE : :
JOHN RENTZ AND STEVEN : :
CLYMER : NO. 96-740

O R D E R

AND NOW, this day of April, 1998, consistent with
the court's order of March 31, 1998 granting defendants' Motions
for Summary Judgment, **IT IS HEREBY ORDERED** that the attached
memorandum opinion be filed and made a part of the record in this
case.

BY THE COURT:

JAY C. WALDMAN, J.

